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REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NUMBER 58 OF 2020

BETWEEN:

DAISON KUMBANGA.....CLAIMANT

AND

MAKANDI TEA AND COFFEE ESTATES.....DEFENDANT

CORAM: WYSON CHAMDIMBA NKHATA (AR)

Mr. Mickeous- of Counsel for the Claimant

Mr. Nthembako Banda-of Counsel for the Defendant

Ms. Chida- Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

INTRODUCTION

The claimant suffered injury while under the employment of the defendant. The statement of case indicates that the defendant was at all material time a company registered in the Republic of Malawi and it produces tea and coffee. Apparently, the claimant was working as a chainsaw operator. On 17th July, 2019, he was on duty cutting a bluegum tree using a chainsaw. The tree hit another tree as it fell and started falling towards his direction whereupon it hit him while in the pit where he had fallen and he got injured. The Claimant commenced this action against the Defendant herein claiming damages for pain and suffering, damages for incapacitation, damages for deformity, and costs of the action. The issue of liability was settled in favour of the claimant through a summary judgment on 5th of May, 2021 before Honourable Justice N'riva. The matter was referred to this court for assessment of damages which I must now consider.

THE EVIDENCE

Through his witness statement that he adopted in court, the Claimant testified that as a result of the accident, he sustained an open fracture of the left tibia and fibula and he was treated at Thyolo District Hospital whilst in severe pain. He exhibits hereto a copy of his medical report marked “DK”. He was admitted at Thyolo District Hospital for seventeen (17) days from 17th July, 2019 up to 9th August, 2019. He was subjected to very painful medical and surgical procedures while in hospital. He underwent thorough washout and debridement which was aimed at removing dead tissues and re-alignment of the bone. He felt excruciating third degree post traumatic pain and neuritis which he still feels to date. He was also put on Plaster of Paris (PoP) for 6 weeks and had to go through daily wound dressing.

He further testified that he was enjoying robust health and he never had any health complaints in respect of his left leg. Furthermore, before the accident herein he could walk long distances without any problems. He could also enjoy hobbies such as jogging and running without any problems. He no longer enjoys good health in respect of his left leg any more as his general health is now poor. He now has a degenerative condition. He is now incapacitated at twenty eight percent (28%). He now suffers from neuritis which has resulted in reduced range of motion as such he can no longer run or jog without any problems. He also now fails to do his normal duties as he used to do before the accident herein. He laments that he is deformed and has suffered a limb length discrepancy which he never suffered before the accident herein.

In cross-examination, he stated that he has been working for the defendant for 4 years. He stated that he was injured on the foot and that he was admitted at the hospital for 22 days. He stated that he did not feel that well as his leg was still painful.

Such was the evidence on assessment of damages. I would like to thank Counsel for the guidance as evidenced by the well-researched submissions filed in support of the assessment of damages herein in which several authorities have been cited. This court has given the submissions and the authorities counsels cited the most anxious consideration.

THE LAW AND APPLICABLE LEGAL PRINCIPLES

On the law and principles governing assessment of damages, it is trite that the purpose of awarding damages is to compensate the injured party as nearly as possible as money can do. That is to say, to place the claimant in a position he would be had he not suffered the damage or loss. This is what is termed the principle of *restitutio intergrum*. It is not possible to quantify damages with exactitude. However, courts

use comparable cases as a guide in coming up with a reasonable quantum of damages. See the case of **Kalinda –vs- Attorney General (1992) 15 MLR 170 at p 172**. The Court will also consider factors like passage of time when the award was made, as well as the value of the kwacha at the time of making the award.

Pain and suffering

The word “pain” connotes that which is immediately felt upon the nerves and brain, be it directly related to the accident or resulting from medical treatment necessitated by the accident while “suffering” includes fright, fear of future disability, humiliation, embarrassment and sickness. See: **Ian Goldrein et al, Personal Injury Litigation, Practice and Precedents** (Butterworths, 1985) and **City of Blantyre vs. Sagawa**: [1993] 16(1) MLR 67 (MSCA). In **Sakonda vs. S.R. Nicholas**: Civil Appeal Cause No. 67 of 2013, it was highlighted that pain and suffering is attributable to the claimant's injury or to any necessary surgical operations and mental anguish.

The fundamental factor in assessing damages for pain and suffering was aptly put by the Supreme Court of Appeal in **Chidule vs. Medi**: Malawi Supreme Court of Appeal, Civil Appeal No. 12 of 1993, to say:

“In assessing damages for pain and suffering, the court must consider the pain which the particular plaintiff has suffered because the circumstances of the particular plaintiff are bound to have a decisive effect in the assessment of damages”.

The implication of the above statement is that, in principle and practice, each case must be dealt with according to its peculiar circumstances.

Loss of amenities of Life

Loss of amenities is attributable to deprivation of the claimant's capacity to engage in some sport or past-time which he/ she formerly enjoyed. Basing on the case of **Kanyoni vs. Attorney General**: [1990] 13 MLR 169. It means that he is incapable of performing some activities he used to do. Damages for loss of amenities of life are therefore awarded for the fact that the plaintiff is simply deprived of the pleasures of life, which amounts to a substantial loss, whether the plaintiff is aware of the loss or not. **Poh Choo vs. Camden and Islington Area Health Authority**: [1979] 2 All ER 91.

Disfigurement

Damages under the head of disfigurement are paid for the change in physical form of a person injured either as a result of the impact of the injury or its treatment, such as scar coming in as a result of surgical operation necessitated by the injury. It is a change in appearance but it is capable of limiting a person from doing certain things- see- **Francis Chikoti vs- United General Insurance Company Limited** Personal

Injury Cause No. 730 of 2016. Justice Potani (as he was then) in the case of **James Chaika v NICO General Insurance Company Ltd** Civil Cause No. 909 said disfigurement is not a matter to be taken lightly and casually as it is something that one has to permanently live with.

COMPARABLE CASES

In this case, Counsel representing the claimant calls upon the court to consider the following cases for comparison:

- **Rex Walala -vs- Davison Chikuta and Prime Insurance Co Ltd** Personal Injury Cause Number 461 of 2011, wherein the claimant suffered fracture of the left tibia and bruises on the left arm was awarded MK2,500,000.00 as damages for pain and suffering, MK3, 000, 000.00 for loss of amenities of life, and MK1,000,000.00 for deformity. In total, he was awarded a global sum of MK6,500,000.00. The award was made on 20th March, 2013.
- **Mhango -vs- Nico General Insurance Co Ltd** Civil Cause No. 703 of 2016, wherein the court on 31st January, 2017 awarded the claimant who suffered fracture of the right leg the sum of MK5,700,000.00 as damages for pain and suffering.
- **Chilembwe Phiri -vs- General Alliance Insurance Co**, Personal Injury Cause Number 350 of 2012, wherein the claimant who suffered a fracture on the right leg and dislocation on the left ankle was on 19th April, 2013 awarded MK7,000,000.00 as damages for pain and suffering and loss of amenities of life.

In view of the foregoing, Counsel representing the Claimant prays for an award of MK10,000,000.00 for damages for pain and suffering, loss of amenities of life and for disfigurement.

DETERMINATION

In making assessment, the court takes note that the evidence indicates the Claimant sustained an open fracture of the left tibia and fibula. He was admitted at Thyolo District Hospital for seventeen (17) days. He lamented in his testimony that he was subjected to painful medical and surgical procedures as he underwent thorough washout and debridement which was intended to remove dead tissues and to re-align bone. He further lamented that he felt excruciating third degree post traumatic pain and neuritis which he still feels to date. He also stated that he cast on Plaster of Paris (PoP) for 6 weeks. The court takes note that his general health is now poor and has problems walking for long distances as well as enjoying his hobbies such as jogging and running. The court also takes note that he is incapacitated at 28% and is deformed as he now has a limb length discrepancy. The court was shown the part where he sustained a

fracture. Evidently, it is still swollen albeit that the accident occurred two years and some months ago. One wonders if at all he will regain his pre-accident physical form. All in all, the court is compelled to hold the view that the accident caused serious injuries to the claimant and they call for a substantial award.

It would appear that if the award is to be conventional, an award for a similar injury should be comparable and should, to some extent, be influenced by amounts awarded in previous cases, either in the same or neighbouring jurisdictions. *see City of Blantyre v Sagawa* (supra). Counsel representing the claimant has cited several cases for comparative purposes. The cases involve at least a fracture and other soft tissue injuries. Observably, they all indicate awards in the region of K7,000,000.00. The court, however, takes into consideration that the latest of the cited cases was decided in the year 2017. The court does not lose sight of the passage of time and the devaluation of the Malawi Kwacha.

CONCLUSION

It is upon a thorough consideration of facts and circumstances of this case and upon an exhaustive consideration of the submissions by Counsel for the claimant in the light of the relevant and applicable law regarding damages for personal injuries that this court awards the claimant **K7,000,000.00** under these heads. The claimant is further awarded costs for the assessment of damages proceedings to be taxed if not agreed by the parties.

DELIVERED IN CHAMBERS THIS 16TH DAY OF AUGUST 2021


WYSON CHAMBUMBA NKHATA

ASSISTANT REGISTRAR